prior beneficial interests."

Public Finance Bhd. v. *Narayanasamy*[2] also dealt with an application for the sale of land charged to recover the principal and interests due. Three of the sub-purchasers applied to be added as respondents in the application for order of sale. The object of the sub-purchasers was to claim ownership of 45 acres of the land and to have the same excluded from any order of sale made by the court. The finance company opposed the intervention of the sub-purchasers and contended that they need not pay any regard whatsoever to the rights of the sub-purchasers. The learned judge there found that the finance company was guilty of fraud and collusion and dismissed the application. They appealed to the Federal Court but the appeal was dismissed. In the course of his judgment Ong C.J. set out the rights of the sub-purchasers in that case. Ong C.J. said at page 33:

"It is crystal clear that the object of these three sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any order of sale made by the court. We have no doubt whatever in our minds that they are entitled to a decree of specific performance against the respondent. They had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued."

The Chief Justice also said:

"It was argued that, had any of them paid up in full at the time of execution of the charge, their case might have been unanswerable. The simple answer is that the appellants were aware of their inchoate rights against the respondent and that completion by them in due course may be fully expected by reason of the substantial sums already paid. What matters is that at the time the appellants applied for an order of sale the three sub-purchasers were beneficial owners of their 45 acres. By their intervention they merely asked that their legal rights should be recognised."

The Federal Court in *Public Finance Bhd.* held that the finance company's insistence that the sub-purchasers had no rights whatsoever except a right to damages for breach of contract is "so plainly unconscionable" (page 33).

Coming back to the instant case it is immaterial in our view that purchasers of the other lots had agreed to the sale of the land subject to their being refunded a certain amount of the purchase money. The appellant has a perfectly legitimate right to pursue his remedy. He has paid a substantial sum of the purchase price. He has alleged fraud and has set out particulars of the fraud allegedly perpetrated against him by the first and second respondents and he seeks to defeat the indefeasible title of the second respondent on those grounds. He is also asking for specific performance of the sale and purchase agreement against the first respondent. The least we can do is to allow him the opportunity to prove his allegations.

Appeal allowed.

Appeal allowed.

Solicitors: *K. Chandran & Co.; Sothi & Ang.*

PUBLIC PROSECUTOR v. JAMALUL KHAIR

[R. Cr. J. (Gunn Chit Tuan J.) August 20, 1984]

[Kuala Lumpur – Federal Territory Criminal Revision No. 7 of 1984]

Criminal Law and Procedure – Plea of guilty recorded – Withdrawal of plea before sentence – Whether President functus officio – Revision – Penal Code, ss. 324 & 354 – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(m)(2) & 183(ii).

In this case, the accused was charged in the Sessions Court for two offences under sections 324 and 354 of the Penal Code. He pleaded guilty to both charges. His pleas were recorded and he was found guilty on both charges and convicted accordingly. Sentence was postponed at the request of the accused. On the day fixed for sentence, he informed the court that he wished to withdraw his pleas of guilty because they were not made voluntarily. The learned President accepted the reasons given by the accused and allowed him to withdraw his pleas of guilty. Thinking that she might have erred, she sent the record to the learned Judge for revision.

Held: (1) if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. The learned President was not *functus officio* in this case until she had passed a sentence or had otherwise finally adjudicated the matter;

(2) there was no need for any order of revision. The President should proceed to try the case.

[*Editorial Note:* The Public Prosecutor applied by notice of motion to the Federal Court (Application No. 15 of 1984) for leave to refer the following question of law of public interest for determination under section 66 of the Courts of Judicature Act, 1964: "Whether a Court can, in law, allow an accused person to withdraw his plea of guilty in respect of a charge which was explained and understood by him and upon whose plea of guilty he was duly convicted by the Court." On October 15, 1984, the Federal Court

(Abdul Hamid Ag. L.P., Mohamed Azmi & Barakbah F.JJ.) refused leave. No written judgment appears to have been given. In the Federal Court, Encik Mohtar Abdullah (Deputy Public Prosecutor) appeared for the Public Prosecutor, and Encik Sidney Augustin appeared for the accused.]

Cases referred to:

(1) *Wong Sin Yeow* v. *Public Prosecutor* [1968] 1 M.L.J. 230, 231.
(2) *S. (An Infant)* v. *Recorder of Manchester* [1970] 2 W.L.R. 21, 25.

CRIMINAL REVISION.

Gooi Soon Seng (Deputy Public Prosecutor) for Public Prosecutor.

Sidney Augustin for the accused.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The record of this case was sent to me by one of the Presidents, Sessions Court, Kuala Lumpur, for the purpose of revision or directions. The accused was charged in the Sessions Court, Kuala Lumpur, for two offences under section 324 and section 354 of the Penal Code respectively. After the two charges were read and explained to him, he pleaded guilty to both charges. The facts of the case narrated by the prosecuting officer were also admitted by him. The learned President recorded his pleas, found him guilty on both charges and convicted him accordingly, but did not pass sentence on that day because the accused requested a postponement of sentence. On the day fixed for sentence, when the accused was asked whether he had any plea in mitigation of sentence, he informed the court that he wished to withdraw his pleas of guilty because they were not made voluntarily. He also said that on the previous day he was facing financial problems and did not have a lawyer. As the learned President accepted the reasons given by the accused she allowed him to withdraw his pleas of guilty. But after the said President had granted permission to the accused to withdraw his pleas she thought that she might have erred in not complying with the relevant provisions of the Criminal Procedure Code regarding finding and sentence and therefore sent the record of the proceeding to me for revision.

Although the said President had in mind the provisions of section 183(ii) of the Criminal Procedure Code (F.M.S. Cap. 6) regarding finding and sentence by the High Court in a trial without assessors, the learned deputy correctly pointed out that the relevant provisions applicable to a summary trial by magistrates are in section 173(m)(2) of the said Criminal Procedure Code which is as follows:-

"If the Court finds the accused guilty or if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law."

The learned deputy then drew my attention to *Wong Sing Yeow* v. *Public Prosecutor*[1] in which case an accused person was charged with the offence of housebreaking by night. He pleaded guilty and was convicted for the offence, but sentence was deferred at the request of the prosecution. When the accused later appeared for sentence, he was represented by counsel who informed the court that his client wished to withdraw the plea of guilt. The magistrate refused to permit the plea to be withdrawn and the accused was accordingly sentenced. On appeal to the High Court, Kota Bharu, Wan Suleiman J. (as he then was) dismissed the appeal and held *inter alia'* that the magistrate was *functus officio* after having recorded a conviction against the accused and therefore he could not permit the plea of guilty to be withdrawn. The learned deputy therefore contended that the President in this case was also *functa officio* and she should not have allowed the accused to withdraw his pleas and should have passed sentence on him according to law.

On the other hand, Mr. Sidney Augustin, who appeared for the accused, drew my attention to the fairly recent English House of Lords' case of *S. (An Infant)* v. *Recorder of Manchester.*[2] In that case S., then aged 16, appeared before a juvenile court on a charge of attempted rape. He consented to be tried summarily, and pleaded guilty. The plea was accepted and the magistrates entered a finding of guilt. The hearing was then adjourned for the purpose of enquiring into his physical and mental condition. On the adjourned hearing S. was legally represented and his lawyer, having drawn the attention of the court to his mental condition and to what was said to be instances of previous spurious confessions on his part, asked that he be allowed to withdraw his plea of guilty and to plead not guilty instead. The magistrates, however, refused the application on the grounds that they were *functi officio* and had no such authority. They therefore proceeded to consider the medical reports on S. and made an order against him under the U.K. Mental Health Act, 1959. On appeal to the House of Lords from the Divisional Court, which had dismissed an appeal by S, it was held,

allowing the appeal, that a court of summary jurisdiction which had accepted a plea of guilty to the offence charged was not in law debarred from permitting (at any time before passing sentence) a plea of not guilty to be substituted. That, accordingly, on the facts found it was open to the juvenile court to permit S. to withdraw his plea of guilty and to substitute therefor a plea of not guilty.

With respect, I thought that Wan Suleiman J. (as he then was) was only concerned with the facts and circumstances of *Wong Sin Yeow's*[1] case when he said in his judgment in that case that he was "inclined to the view that in this appeal, having recorded a conviction against the appellant, the learned magistrate was *functus officio* and cannot therefore permit the plea to be withdrawn." But in this case I agreed with Mr. Augustin that it would be useful to note the following observations on the meaning of 'conviction' by Lord Reid in the above-mentioned House of Lords' case:

"Much of the difficulty has arisen from the fact that "conviction" is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is proper to say that a plea cannot be changed after "conviction" in the former sense. But it does not at all follow that a plea cannot be changed after "conviction" in the latter sense."

Wong Sin Yeow's is therefore distinguishable as Wan Suleiman J. (as he then was) was obviously using the word "conviction" in the former sense referred to by Lord Reid in his above-quoted *dictum*. Although Lord Reid in that House of Lords' case was referring to the word "conviction" used in the U.K. Magistrates' Courts Act, 1952, and that word is not in the above-quoted section 173(m)(2) of our Criminal Procedure Code (F.M.S. Cap. 6) yet I would with respect prefer to follow and adopt the reasoning of Lord Reid in that case that one cannot infer any intention of the legislature to alter as regards summary jurisdiction the old rule that a plea can be changed at any time before final disposal of the case. In the words of Lord Reid it "cannot be right because every day accused persons who begin by pleading not guilty change their plea to guilty after the plea of not guilty has been recorded and the trial has begun, and that raises no technical difficulty." It follows that if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. I therefore considered that the said President was not *functa officio* in this case until she has passed a sentence or has otherwise finally adjudicated the matter. In the circumstances there was no need for any order of revision, and I directed that the learned president should proceed to try the case.

Order accordingly.

Solicitors: *Augustin-Negrin & Co.*

We reproduce below the Order of the Federal Court (Abdul Hamid, Ag. L.P., Mohamed Azmi & Syed Agil Barakbah F.JJ.) dated October 15, 1984:

ORDER

"UPON MOTION made unto court this day by Encik Mohtar bin Abdullah, Deputy Public Prosecutor for the Applicant and in the presence of Encik Sidney Augustin of counsel for the Respondent *AND UPON READING* the Notice of motion dated the 28th day of August, 1984 and the Affidavit of Gooi Soon Seng affirmed on the 25th day of August, 1984 all filed herein *AND UPON HEARING* the Deputy Public Prosecutor as aforesaid *IT IS ORDERED* that leave to refer question of law or public interest under section 66 of the Courts of Judicature Act, 1964 namely:

> 'Whether a Court can, in law, allow an accused person to withdraw his plea of guilty in respect of a charge which was explained and understood by him and upon whose plea of guilty he was duly convicted by the court.'

be and is hereby refused.

GIVEN under my hand and the seal of the court this 15th day of October, 1984.

Sd. Soo Ai Lin
Senior Assistant Registrar,
Federal Court Malaysia
Kuala Lumpur."